

**COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY
CABLE TELEVISION DIVISION**

In the Matter of:)	
)	
MediaOne of Massachusetts, Inc.,)	Docket No. 99-4
MediaOne Group, Inc., and AT&T Corp.)	
)	Date Issued: September 1, 2000
Appellants)	
vs.)	
)	
City Manager of the City of Cambridge)	
)	
Appellee)	

INTERLOCUTORY ORDER ON SCOPE OF THE PROCEEDING

This action comes before the Cable Division of the Department of Telecommunications and Energy upon appellants MediaOne of Massachusetts, Inc., MediaOne Group, Inc., and AT&T Corp.'s appeal of the disposition of MediaOne's cable license transfer application by the appellee, the City Manager of the City of Cambridge.

APPEARANCES: Paul Glist, Esq.
James F. Ireland, Esq.
Cole, Raywid & Braverman, L.L.P.
1919 Pennsylvania Avenue, N.W., Suite 200
Washington, D.C. 20006

-and-

Kenneth Ira Spigle, Esq.
246 Walnut Street
Newton, MA 02460

-and-

Jeffrey Fialky, Esq.
MediaOne of Massachusetts, Inc.
6 Campanelli Drive
Andover, MA 01810

-and-

Michael Morrissey, Esq.
Katherine P. White, Esq.
AT&T Corp.
99 Bedford Street
Boston, MA 02111
FOR: MEDIAONE and AT&T
Appellants

Peter J. Epstein, Esq.
101 Arch Street, Suite 900
Boston, MA 02110

-and-

Charles Nesson, Esq.
1575 Massachusetts Avenue
Cambridge, MA 02138
FOR: MANAGER OF THE CITY OF CAMBRIDGE
Appellee

I. INTRODUCTION

On July 13, 1999, pursuant to G.L. c. 166A, § 7 and 207 C.M.R. § 4.00 et seq., MediaOne of Massachusetts, Inc., MediaOne of Ohio, Inc., MediaOne Group, Inc. (“MediaOne”), and AT&T Corp. (“AT&T”) (together “Appellants” or “the Companies”) submitted applications for approval of a change of control of cable television licenses from MediaOne to AT&T of 175 cities and towns in Massachusetts, including the City of Cambridge (“Cambridge”). Cambridge held a public hearing on August 19, 1999. Following the public hearing, Cambridge denied the proposed license transfer, stating that (1) AT&T is not likely to adhere to the terms and conditions of the Final License because it plans to retain MediaOne’s current management, (2) AT&T itself does not have the cable television management experience to assume control of the Cambridge cable system, (3) AT&T has refused to provide nondiscriminatory access to its cable modem platform in Cambridge for unaffiliated providers of Internet and on-line services, and (4) the issuing authority does not believe the transfer is in the public interest because AT&T refused to provide nondiscriminatory access to its cable modem platform and also failed to make a case that the transfer would benefit Cambridge television subscribers. City Manager Decision Regarding the Cable Television Transfer Request (November 10, 1999).

Pursuant to G.L. c. 166A, § 14, MediaOne and AT&T filed an appeal of Cambridge’s vote to withhold approval of the license transfer with the Cable Television Division (“Cable Division”) of the Department of Telecommunications and Energy. With the appeal, Appellants filed a motion for summary decision with supporting memoranda pursuant to 801 C.M.R. § 1.01 (7)(h). On May 1, 2000, the Cable Division granted the Companies’ motion in part and denied it in part. Order on Motion for Summary Decision/ Consolidation, CTV 99-2, 99-3, 99-4, 99-5 (May 1, 2000) (“Order”).¹ In denying the motion, in part, the Cable Division found that to the extent the City’s vote is based on AT&T’s alleged lack of management experience, questions of fact exist and hearings are required. Id. at 37. The Cable Division noted that it lacked sufficient information to determine whether Cambridge acted within the scope of its authority when it based its transfer denial on AT&T’s likelihood to adhere to the terms and conditions of the License. Id. at 38.

The Cable Division conducted a procedural conference on August 9, 2000, at which the Cable Division sought to further define the scope of the proceeding. Parties were directed to file pre-hearing briefs addressing whether MediaOne’s alleged non-compliance with its License affected, within the four criteria of 207 C.M.R. § 4.04, AT&T’s ability to step into the shoes of MediaOne (Procedural Conference Transcript at 49). On August 23, 2000, Appellants filed a brief supporting the position that license compliance issues as alleged by the Appellee are not relevant to the current license transfer process. On the same date, Appellee filed a brief supporting its position that non-compliance issues do fall within the Cable Division’s license transfer criteria. This Order addresses the relevancy of the

¹ The Cable Division granted the motion for summary decision on the second two grounds for denial, the “open access” issues.

license compliance issues to this transfer proceeding.

II. SUMMARY OF POSITIONS

Appellee has identified what it considers to be substantial non-compliance by the transferor, MediaOne (Appellee Pre-Hearing Brief at 2). Appellee now argues that AT&T's treatment of MediaOne's alleged non-compliance is evidence of AT&T's lack of legal, managerial, technical, and financial ability to assume the obligations under the License (*id.*). Appellee relies heavily on AT&T's representation that it intends to retain many of the MediaOne management personnel as support for its position that non-compliance under MediaOne's control necessarily would result in non-compliance under AT&T's control (*id.* at 5). Appellee states that "few factors could be more relevant to assessment of management ability of a transferee than how it responds to a matter of gravity such as material non-compliance"(*id.* at 6).

Appellants argue that license compliance issues are part of the "backward looking" criteria required in the renewal ascertainment process (Appellant Pre-Hearing Brief at 4). By contrast, according to Appellants, the transfer process serves a "protective function" of ensuring the applicant can step into the shoes of the Licensee (*id.* at 4). AT&T also argues that Cambridge never tied the non-compliance issue to any of the four regulatory criteria, and that it is too late now to do so as post-hoc rationalization (*id.* at 4-5, *citing* 207 C.M.R. § 4.04). Thus, Appellants assert that allegations of non-compliance are irrelevant to a transfer proceeding, and that disputes over performance are realities of licenses and contracts (*id.* at 5).

In support of their position, Appellants point out that the Federal Communications Commission's ("FCC") Form 394 transfer process does not account for non-compliance issues, which looks at the qualifications of the transferee (*id.* at 6, n.13). Further, Appellants argue that non-compliance issues are removed from other analogous FCC proceedings (*id.* at 6, n.14). Appellants argue that allegations of non-compliance cannot be grounds for disqualification because they would take longer to resolve than the 120 days permitted by state and federal law (*id.* at 8). Appellants assert that the renewal process is better suited for review of past performance, given that the renewal process runs 36 months versus 120 days for the review of a transfer application (*id.*). In further support, Appellants assert that there are other remedies for non-compliance, including license remedies (*id.*).

III. ANALYSIS AND FINDINGS

In the Order, the Cable Division clearly stated that the scope of an issuing authority's review of a license transfer application is set forth in our regulations at 207 C.M.R. § 4.04. See Order at 12-16. The transfer regulations state in pertinent part:

- (1) In reviewing an application for a transfer or assignment of a license

or control thereof, an issuing authority shall consider only the transferee's

- (a) management experience,
- (b) technical expertise,
- (c) financial capability, and
- (d) legal ability to operate a cable system under the existing

license.

- (2) As part of an issuing authority's review of an application for a transfer or assignment of a license or control thereof, an issuing authority shall not propose amendments to or renegotiate the terms of the existing license or any license renewal proposal.

207 C.M.R. § 4.04.

Nevertheless, Appellee, in its pre-hearing brief, attempts to reargue matters resolved in the Order. Specifically, Appellee renews its argument that the scope of the transfer review is broad (Appellee Pre-Hearing Brief at 3, citing Bay Shore Cable TV Associates v. Weymouth, Docket No. A-55 (1985) (“Bay Shore”) and Rollins Cablevision v. Somerset, Docket No. A-64 (1988)). In making this argument, Appellee references two Cable Division cases, but fails to reference the Cable Division’s later promulgated regulations. Moreover, Appellee disregards the Cable Division’s statement that this stage of the proceeding was not an opportunity to reargue matters decided in the Order. Accordingly, the Cable Division affirms here its previous finding that the scope of a transfer review proceeding is set forth in our regulations. Thus, for the Cable Division to determine whether the City Manager’s decision to deny AT&T’s application based on alleged non-compliance by MediaOne is within the scope of the transfer process, the Cable Division must determine that alleged non-compliance by MediaOne is evidence of AT&T’s managerial, technical, financial or legal ability to step into the shoes of MediaOne, as Licensee to Cambridge.

In making the above determination, we consider the state and federal license transfer requirements. The transfer process, both under federal and state law, is distinct from any other licensing process. The transfer process is not designed to resolve compliance issues that may have arisen at any point during the license term, in this instance a period of fifteen years. Under federal law, a review of a transfer application must be completed within 120 days of the filing of the transfer application, a timeframe not conducive to a meaningful review of a licensee’s performance during the license term. Compare 47 U.S.C. § 537, G.L. c. 166A, §§ 7, 14, 207 C.M.R. § 4.02(2) with 47 U.S.C. § 541(a), 47 U.S.C. § 546(a); 207 C.M.R. §§ 3.02, 3.05, 3.07. Moreover, an applicant cannot be charged with discovering independently whether or not a licensee is in fact in breach and then with remedying the breach, all within the 120-day period. Our state regulatory scheme supplements the federal scheme by requiring hearings to be held within 60 days of the filing of the applications. 207 C.M.R. § 4.03. Further, as we have stated, the transfer process reflects a protective intent: to

ensure that a transferee – who, by definition, was not a party to the franchise at the time it was executed – is nonetheless fully qualified to fulfill the existing franchise obligations. Bay Shore at 3; In re Amendment of 207 C.M.R. §§ 4.01-4.06, Docket No. R-24, Report and Order at 17-18 (1995). Although Appellee asserts that licensing authorities throughout the United States treat alleged non-compliance as relevant to a transferee's ability to assume a license and asks the Division to take judicial notice of this assertion, Appellee provides no authority for its assertion. Moreover, Appellee fails to explain the relevance of a standard of review operative in other jurisdictions, given the Massachusetts regulatory standard of review.

In response to our request for briefs made at the procedural conference, Cambridge provides us with broad assertions that non-compliance is relevant to all four prongs of 207 C.M.R. § 4.04. The only argument Appellee advances to suggest MediaOne's alleged non-compliance reflects on AT&T's ability to step into MediaOne's shoes is that AT&T represented that it planned to retain MediaOne's management personnel. Cambridge asserts that given MediaOne's alleged non-compliance, and MediaOne's failure to correct the alleged non-compliance, and given AT&T's stated aim to use MediaOne's personnel to operate the Cambridge cable system, AT&T is not likely to comply with the terms and conditions of the License (Denial Report at 3). Cambridge does not argue that AT&T is unable to comply with the existing license, but speculates that AT&T will not comply. Cambridge's arguments focus more on the likelihood than the ability of AT&T to comply with the license terms. In the instant matter, the City Manager has compiled a list of alleged failures on the part of MediaOne to comply with its license terms. This list was compiled in conjunction with the on-going license renewal negotiations between MediaOne and Cambridge. Actual non-compliance has not been established; in fact, MediaOne strenuously objects to these allegations (Procedural Conference Transcript at 41, 50-51).

AT&T's burden on transfer is to demonstrate that it has the ability to comply with license terms. As such, AT&T is not obligated to provide solutions to alleged non-compliance issues imported into the transfer process from the ongoing license renewal process. Further, denial of AT&T's application cannot be based on AT&T's alleged failure to rectify any problems existing under the License. AT&T does not have the legal authority to remedy non-compliance issues, if any, until legal transfer of ownership has occurred. Moreover, issuing authority approvals conditioned upon specific assurances of "fixing" non-compliance would violate the requirement of final action. 207 C.M.R. § 4.02(2); 47 U.S.C. § 537; 47 C.F.R. § 76.502. As an applicant to assume control of MediaOne's existing License, AT&T must establish that it possesses the ability to comply with the License once assumed.

As part of these assurances, AT&T may provide evidence of any license obligations, legal or otherwise, that it has to assume upon completion of the transfer.²

We determine that issues of a licensee's actual non-compliance are better suited for the renewal process, which considers the performance of the cable operator under the franchise during the current franchise term. Cable Act of 1984, § 626(a); 47 U.S.C. § 546(a). Allegations of non-compliance with franchise terms are issues the licensee and the issuing authority initially must resolve as part of the renewal, amendment, or revocation process.³ 207 C.M.R. §§ 3.05-3.07, 3.09; G.L. c. 166A, §§ 11, 13, 14. The remedy for any such breach would be found in the license document itself, or in the revocation of the license. Thus, we determine that the issue of whether or not MediaOne has complied with its license obligations is not relevant to this proceeding.

Nevertheless, Cambridge's arguments are not entirely without merit. To the extent AT&T relies on MediaOne's managerial expertise to satisfy the management criteria, it has put the management experience of those personnel at issue. The relevant question with respect to MediaOne's current management is whether AT&T, once it assumes control of the License and MediaOne's managerial resources, will be able to comply with the License. The management experience of AT&T is already before the Cable Division, as AT&T has contested the Cambridge City Manager's second ground for denial that AT&T itself does not have the cable television management experience to assume control of the Cambridge cable system.

Accordingly, the scope of this proceeding is whether or not AT&T has the management experience necessary to step into the shoes of MediaOne. As discussed at the procedural conference, the record will include the evidence AT&T presented to the City Manager regarding its management experience. We will accept evidence relevant to the issue of whether AT&T provided reasonable "forward looking" presentations that AT&T has the ability to run the Cambridge cable system. We will not conduct a fact finding process to determine whether or not actual non-compliance existed at the time the City Manager made his decision to deny AT&T's transfer application. Given that the scope of the proceeding is not any broader than what was anticipated on August 9, 2000, parties are directed to

² In answer to concerns expressed by the City of Cambridge, Appellants offers that the City's rights are protected, as AT&T has agreed to assume MediaOne's liabilities, and the Licensee's duty to comply with the License is unaffected by the transaction. (Appellant Pre-Hearing Brief at 7, fn. 15, citing 2.1(c) of the Asset Purchase Agreement and Del. Gen. Stat. § 259(a)). At this point in the proceeding, the referenced information is not in evidence.

³ Applicants aggrieved by license renewal denials, license modifications, and license revocation may appeal the issuing authority's action to the Cable Division under Chapter 166A, § 14

proceed according to the schedule set forth on that date.

By Order of the
Department of Telecommunications and Energy
Cable Television Division

/S/ Alicia C. Matthews
Alicia C. Matthews
Director